STATE OF WISCONSIN PERSONNEL COMMISSION

LINDA KLEINSTEIBER,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS
Respondent.

Case No. 97-0060-PC

INTERIM DECISION AND ORDER

NATURE OF THE CASE

The underlying appeal is a challenge to appellant's termination from employment by respondent. After an Interim Decision and Order modifying the termination action was issued by the Commission on September 23, 1998, the parties were unable to reach agreement on an appropriate remedy. As a result, a hearing on the remedy issue was conducted by Laurie R. McCallum, Chairperson, on March 18 and 22, 1999. The parties were permitted to file post-hearing briefs and the schedule for doing so was completed on June 21, 1999.

FINDINGS OF FACT

1. The effective date of the subject termination of appellant's employment was May 13, 1997.

2. At the time of her termination, appellant was employed as a Health Services Nursing Supervisor in the Health Services Unit (HSU) at Oakhill Correctional Institution, and was paid $28 per hour. In this position, appellant supervised the staff nurses providing direct patient care—this included responsibility for overseeing and evaluating the nature and quality of the clinical nursing care provided; performed line nursing duties in emergencies or during periods of unusual staff shortages; managed the administrative functions of the HSU; interpreted and applied applicable policies and

procedures; and served as the HSU's liaison to the other units of the institution. Appellant was appointed to this position in January of 1994 as the result of her request for a voluntary demotion from her position as Chief of Ancillary Services for respondent's Bureau of Correctional Health Services, an administrative/policy position. Appellant had held this position, which was headquartered at respondent's central office in Madison, since June of 1980.

3. From 1975 until 1980, appellant was employed as a public health nurse. Her duties in this position included direct patient contact and care.

4. Between May 13, 1997, the effective date of her termination, and September 23, 1998, the date of the Commission's Interim Decision and Order, complainant applied for the following three jobs:

a. June of 1997—St. Clare Hospital—Baraboo, Wisconsin—nursing/patient education position—this position paid less than $20 per hour and, as a result, appellant decided not to complete the interview process;

b. October of 1997—Lakeside Country Store—Merrimac, Wisconsin—part-time clerk position paying $6 per hour—appellant accepted this position and worked in it until August of 1998;

c. November of 1997—Department of Health and Family Services, Division of Health—Nursing Consultant 2 position headquartered in Madison working with Medicare/Medical Assistance audits—appellant was not selected for this position but would have accepted it if she had received an offer—the record does not indicate the reason appellant was not hired for this position.

5. During the time period relevant to this matter, there was a severe shortage of registered nurses available to fill vacant positions in hospitals, nursing homes, home health care agencies, and community based residential facilities serving the elderly and disabled in the Madison area. As of the date of hearing, for example, there were 70 vacant clinical nursing positions at the University of Wisconsin Hospital. The duties and responsibilities of these clinical nursing positions are comparable to the duties and responsibilities of the Nurse Clinician positions appellant supervised while employed by

respondent in the Oakhill HSU. Experienced clinical nurses employed in hospitals in the Madison area during the relevant time period were paid in the $20 per hour range and some earned 4 to 5 weeks of vacation per year.

6. Appellant did not apply for any nursing positions in the Madison area between May of 1997 and September of 1998 because she wasn't interested in such positions. Appellant did not feel during this period of time that she needed any retraining in order to function as a clinical nurse, and didn't take steps to determine whether such training was available.

7. If appellant had been re-employed in a Nurse Clinician position in state service during the time period relevant here, her salary would have been approximately $22 per hour.

8. During the time period relevant here, a four-month correspondence course for nurses seeking to update their clinical skills was offered through the Wisconsin technical college system.

9. Between May of 1997 and September of 1998, the facts that appellant had been terminated from her supervisory position, was involved in litigation relating to this termination, and had little recent experience as a clinical nurse would work to her disadvantage in competing for nursing positions, particularly supervisory positions.

10. Prior to March 26, 1998, the parties to this action had been involved in settlement discussions.

11. In March of 1998, Cynthia Schoeneke, Assistant Administrator, Division of Adult Institutions, became involved in locating a position for appellant. These efforts were unrelated to the settlement discussions referenced in Finding 11, above. Prior to March 26, 1998, Ms. Schoeneke advised Hamdy Ezalarab, Director of the Bureau of Personnel and Human Resources, that she would loan him a .5 FTE position from her division if he could find another .5 FTE position in his bureau in order to create a new position for appellant in the employee health unit which was a part of the bureau which Mr. Ezalarab directed. Mr. Ezalarab agreed to do this and understood from his

conversation with Ms. Schoeneke that he should have appellant start working in this new position as soon as possible.

12. On March 26, 1998, Mr. Ezalarab met with appellant and her attorney to discuss this new position. David Rutter, the supervisor of the employee health unit to which this position would be assigned, was present at part of this meeting to answer questions about the position. Mr. Rutter had opposed creating this position for appellant and offering it to her because he had planned to use the .5 FTE position in his unit for other purposes. During this meeting, appellant expressed concerns about the travel requirements of this position. Mr. Ezalarab assured appellant that he would minimize the travel requirements as much as possible, and would attempt to relocate the headquarters of the position from Madison to Columbia Correctional Institution in Portage, which is closer to appellant's home in Merrimac and closer to the northern institutions. Mr. Ezalarab indicated that this position required a visit to each of the northern institutions four times a year, that each visit would last no longer than one day, that there were fewer than ten institutions in the northern sector, and that she would not be required to be away from home overnight. Appellant indicated that she did not object to travel as long as it was not overnight. Appellant concluded from this discussion that she would not be able to complete the required employee health services in a northern institution in one days' time, that it would be inefficient to drive back home each day she spent up north, and that, as a result, she would be away from home for periods of five days at a time four times a year. Appellant did not communicate this conclusion at the meeting.

13. Mr. Ezalarab had the authority to offer appellant the position at the meeting of March 26, 1998, and he did so. Mr. Ezalarab placed no conditions on this offer. Mr. Ezalarab had no authority relating to the settlement of appellant's case before the Commission and was not involved in settlement negotiations. Appellant did not accept or reject Mr. Ezalarab's offer at the March 26, 1998, meeting. Mr. Ezalarab understood that counsel for respondent would be reducing the offer he had made to appellant to writing. Appellant communicated to respondent her rejection of the offer

either later on March 26 or early March 27, 1998, before any such writing was prepared.

14. After appellant's rejection of the position in the employee health services unit, Ms. Schoeneke requested information about other available vacancies from Sharon Zunker, Director of the Bureau of Health Services within the Division of Adult Institutions, and Sanger Powers, Jr., Human Resources Officer. Ms. Schoeneke concluded from her review of available vacancies that the most suitable one was a vacancy in a Nurse Clinician position at Jackson Correctional Institution in Black River Falls.

15. In a letter to appellant dated March 27, 1998, Dick Verhagen, Administrator of the Division of Adult Institutions, stated as follows, in pertinent part:

> We are hereby offering you the position of Nurse Clinician 2 at the Jackson Correctional Institution, Health Services Unit effective Monday, April 13, 1998.
>
> Please report to Judy Nordahl, Health Services Manager at Jackson Correctional Institution at 8:00 AM on Monday April 13, 1998.
>
> This is a job offer which is not conditional on the settlement of your case in the Personnel Commission.
>
> If this starting time is not convenient for you based on your other commitments, we are willing to delay the starting date a week or two.
>
> Please contact the Director of Health Services, Sharon Zunker, at 608 267 1730, if you will not report to Jackson Health Services Unit on April 13, 1998.

16. In a letter to Mr. Verhagen dated March 31, 1998, appellant stated as follows, in pertinent part:

> This letter responds to the Department's offer of employment in the Jackson Correctional Institution ("JCI") in a Nurse Clinician II position, per your letter of March 27, 1998.
>
> As the Department is well aware, I reside in Merimac, Wisconsin, which is approximately 110 driving miles from Black River Falls, where JCI is located. As the Department is also well aware, my former work

> locations with the Department were in Madison, Wisconsin, and in Oregon, Wisconsin (the Oakhill Correctional Institution).
>
> Your offer to employ me at an institution located 110 driving miles from my place of residence is not reasonable, particularly when the position involves a reduction of approximately $6.00 per hour from my previous position with the Department, and would entail a substantial demotion from my last position. As I made clear in my communications with the Department's counsel, I would be ready and willing to accept a similar day-shift position at the Columbia Correctional Institution in Portage, Wisconsin, notwithstanding the reduction in status and pay, given its proximity to my residence, and as part of a resolution of the current litigation between the Department and me.
>
> Again, an offer of employment 110 miles from my place of residence, with diminished status and diminished pay, is not a reasonable equivalent of my former position, and the drive itself makes the offer wholly unreasonable. I therefore decline it.

17. Appellant became ill and was unable to work during the entire month of September of 1998.

18. In the resume appellant prepared after her termination and utilized in applying for health care positions, she stated under the heading entitled "Objectives," that she was "interested in pursuing employment in areas related to nursing or health care, preferably not in an administrative role."

19. In its Order of September 23, 1998, the Commission stated as follows, in pertinent part:

> The action of respondent is modified to a ten-day suspension without pay and a demotion to a non-supervisory position.

20. Some time prior to October 12, 1998, respondent provided to appellant a list of all vacant, non-supervisory positions in relevant pay ranges. Appellant indicated that she had questions about certain of these positions, and a meeting was scheduled for October 12, 1998, to address these questions. Present at this meeting were appellant, appellant's attorney, respondent's counsel, and Mr. Powers. During this meeting, appellant indicated an interest in a vacant nursing position responsible for overseeing

those nursing positions employed on a contract or limited term basis in the correctional centers in the northern part of the state. Ms. Zunker was called into the meeting to answer questions about this position. This position entailed extensive travel in isolated areas due to the requirement that the position incumbent visit each center four times each year. Appellant understood prior to this meeting that this position required travel to the northern part of the state one week out of every month. Appellant indicated that she would accept this position if its headquarters were relocated to Baraboo or another location close to her home. Respondent decided to retain Oshkosh as the headquarters for this position for program reasons, and appellant, as a result, decided not to accept the position. Appellant did not indicate that she was interested in any other positions on the list of vacancies.

21. In a letter to appellant dated November 19, 1998, Mr. Verhagen stated as follows, in pertinent part:

> Consistent with the recent Personnel Commission decision on your appeal, we are hereby appointing you to the position of Nursing Specialist 2 at the Bureau of Health Services Central Office effective the pay period starting December 6, 1998.
>
> You are directed to report to Pat Voermans, Health Services Nursing Coordinator, at Central Office, 149 E. Wilson St., on Monday, December 7, 1998, at 7:45 AM.
>
> This will constitute an involuntary demotion and based on applicable personnel rules, your salary will be at the grid rate in the new pay range, which corresponds to your seniority. Your salary will be set at $23.008 per hour.
>
> The position description for this job is enclosed.
>
> If this starting time is not convenient for you based on your other commitments, you must still report to work at the above date, time, and place and raise your concerns with your supervisor.

22. The position summary of the position description for this Nursing Specialist 2 position states as follows:

> Under the general supervision of the Health Services Nursing Coordinator, this position functions as a communicable disease public health educator in the Department of Corrections (DOC). The public health educator will apply health education theories, principles and practices; conduct needs assessments; plan and implement effective health education programs; evaluate effectiveness of health education programs; coordinate provision of health education services; act as a resource person in health education, report writing, material development, grant writing; and communicate health education needs, concerns, and resources regarding communicable diseases and infection control for the Department.
>
> This position is responsible for assisting in planning, developing, implementing, and coordinating preventive education programs related to infection control and communicable diseases for staff and inmate populations statewide in the DOC. Major duties include assisting in the development of infection control, communicable diseases, and blood borne pathogen program education to nursing staff and inmates.

23. Appellant reported to work in this Nursing Specialist 2 position as directed in Mr. Verhagen's letter of November 19, 1998. Appellant did not inquire about the travel requirements of this position prior to accepting it. During the first three months of employment in this position, appellant travelled out of Madison on three days.

24. It is a one-hour drive from appellant's home to Oakhill Correctional Institution or to respondent's central office in Madison.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden to show that appellant failed to mitigate damages by exercising reasonable diligence to obtain employment after her termination.

3. Respondent has sustained this burden.

4. Respondent has the burden to show that it made an unconditional offer of reinstatement to appellant sufficient to end the accrual of back pay liability.

5. Respondent sustained this burden as to the position in Mr. Ezalarab's unit.

OPINION

At a prehearing conference conducted on October 8, 1998, the parties agreed to the following statement of issues for hearing:

> 1. What is the appropriate non-supervisory position to which appellant should be appointed pursuant to the Interim Decision and Order issued by the Commission on September 23, 1998.
>
> 2. What amount of back pay is due appellant pursuant to the Interim Decision and Order issued by the Commission on September 23, 1998.

At the commencement of the hearing on March 18, 1999, the parties indicated that they had resolved issue 1; and that, in regard to issue 2., there no longer remained a dispute as to the reimbursement of health insurance premiums or the restoration of vacation and sick leave benefits, and they had agreed that appellant's employment with respondent would be treated as if there had been no break in appellant's state service. The parties further indicated that respondent had acceded to the award of five months' back pay.

The appropriate remedy in a civil service appeal such as this one is governed by §230.43(4), Stats., which states as follows:

> 230.43(4) RIGHTS OF EMPLOYES If an employe has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the commission or any court upon review, the employe shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or classification. Interim earnings or amounts earnable with reasonable diligence by the employe shall operate to reduce back pay otherwise allowable. Amounts received by the employe as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the employe and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making such payment. The employe shall be entitled to an order of mandamus to enforce the payment or other provisions of such order.

Case law provides very little guidance as to the proper interpretation and application of this statutory language. In *Warren v. DHSS*, 92-0750-PC, 92-0234-PC-ER, 5/14/96, the Commission pointed out that the mitigation of back pay damages language in this statutory provision is parallel to that set forth in the Fair Employment Act (FEA) in §111.39(4)(c), Stats. Moreover, the requirement that "reasonable diligence" be exercised to mitigate damages has been utilized in deciding back pay issues involving non-state public employees in Wisconsin and in Title VII cases. As a result, it is useful here to examine cases in which similar statutory or common law requirements have been interpreted for guidance in applying the language of §230.43(4), Stats.

In *State ex rel. Shilling & Klinger v. Baird*, 65 Wis. 2d 394, 222 N.W.2d 666 (1974), the Wisconsin Supreme Court stated that:

> This court has consistently recognized the rule that a discharged employee has a duty to seek other employment, and that the employer has the right to a credit to the extent that the employee obtains work and earns wages, or might have done so. *Schiller v. Keuffel & Esser Co.* (1963), 21 Wis. 2d 545, 552, 553, 124 N.W.2d 646; *Mitchell v. Lewensohn* (1947), 251 Wis. 424, 432, 29 N.W.2d 748; *Gauf v. Milwaukee Athletic Club* (1912), 151 Wis. 333, 336, 139 N.W. 207.
>
> The Wisconsin cases have further held that a discharged or suspended employee is not obligated to seek or accept other employment of a "different or inferior kind in order to minimize damages." *Schiller v. Keuffel & Esser Co., supra*, page 553; *Mitchell v. Lewensohn, supra,* page 432; *State ex rel. Schmidt v. District No. 2* (1941), 237 Wis. 186, 191, 295 N.W. 36.
>
> This court has held that the burden of establishing the lack of reasonable and diligent efforts by employees to seek other employment and the availability of such employment is on the employer. *Schiller v. Keuffel & Esser Co., supra*, page 553; *Barker v. Knickerbocker Life Ins. Co.* (1869), 24 Wis. 630, 638. Thus, the question of whether such opportunities exist is primarily a question of fact. . . .
>
> The appellants introduced no evidence that any alternative employment was available to either Klingler or Schilling during the

periods of time in question. It follows that the appellants have not sustained their burden of proof.

In *Hutchison v. Amateur Electronic Supply, Inc., et al.*, 66 FEP Cases 1275 (7th Cir. 1994), the court stated as follows:

> A Title VII victim is presumptively entitled to full relief. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 [10 FEP Cases 1181]. Once a plaintiff has established the amount of damages she claims resulted from her employer's conduct, the burden of going forward shifts to the defendant to show that the plaintiff failed to mitigate damages or that damages were in fact less than the plaintiff asserts. *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 [50 FEP Cases 1333] (7th Cir. 1989). To establish the affirmative defense of a plaintiff's failure to mitigate damages, the defendants must show that: (1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence. *Id.* . . .
>
> As the trial court noted, the reasonableness of plaintiff's job search "came down to a battle of experts." (citation omitted) She introduced testimony that "she registered with the State of Wisconsin Job Service ("WJS"), attended seminars, joined a networking group, took courses to upgrade her computer skills, answered newspaper ads, and submitted nearly 600 resumes to prospective employers." *Id.* In almost four years, these efforts resulted in 40 personal or telephone interviews but no job offers. . . . [I]t seems quite reasonable for the jury to have concluded, given the conflicting expert opinions and the long period of unemployment, that plaintiff's efforts "might have been sufficient if the period of unemployment had been shorter; they were not good enough for five [here four] years . . . You cannot just leave the labor force after being wrongfully discharged in the hope of someday being made whole by a judgment at law." *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1428 [41 FEP Cases 721] (7th Cir. 1986) (citations omitted).

Given this authority, the first inquiry is whether respondent has shown that appellant failed to exercise reasonable diligence to seek other comparable employment. In *Hutchison, supra,* at page 1279, the court indicated such comparability would be shown by virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status. However, from what position should

these attributes be derived, the position from which appellant was terminated at Oakhill or the position to which the Commission concluded she should be demoted? Section 230.43(4), Stats., requires back pay damages to be determined by the rate to which the employe would have been "entitled by law but for such unlawful removal. . . ." The Commission has not determined that appellant is entitled to be restored to a Health Services Nursing Supervisor position, the position she held at Oakhill at the time of her termination, but instead to a position which would constitute a demotion from this supervisory position. Appellant argues that only a nursing-related position with policy, administrative, and/or management responsibilities should be considered a proper comparable position here. This may have been persuasive had appellant been terminated from her former position as Chief of Ancillary Services for the Bureau of Correctional Health Services. However, appellant had voluntarily demoted from this position to a position in a clinical setting in which she supervised line nursing staff, including the evaluation of their nursing practices and the quality of care they delivered; and in which she occasionally provided direct patient care herself. A demotion from this type of position would properly be to a Nurse Clinician or comparable position, and it is appellant's efforts to obtain employment in this type of position which should be examined to determine whether she exercised reasonable diligence to mitigate back pay damages.

The record here shows that there were numerous vacant clinical nursing positions in the Madison area during the relevant time period, but that appellant didn't apply for them because she wasn't interested in doing that type of work. Appellant does not dispute that the Madison area constituted one of the relevant geographical areas in assessing her employability. Although both appellant's expert and respondent's expert expressed concern about appellant's ability to step in and do this type of work without refresher training, this is not a concern shared by appellant or one which she cited as the basis for failing to apply for these types of jobs. This lack of concern on appellant's part, coupled with her recent experience supervising staff nurses in a clinical setting in their delivery of direct patient care, supports a conclusion that

appellant's lack of recent experience as a line nurse in a clinical setting did not constitute a significant impediment to her employability as a clinical nurse. Based on this record, which shows that appellant completed the application process for only one nursing-related position despite a critical nursing shortage in the Madison area, it is concluded that appellant did not exercise reasonable diligence in seeking work as a clinical nurse in the Madison area.

The next question is whether these available clinical nursing positions were comparable to the Nurse Clinician 2 position to which the Commission has concluded appellant is entitled. As was the situation in the *Hutchison* case cited above, the present case also involved a battle of experts. The testimony of both experts had certain limitations based on the nature and extent of their familiarity with the relevant job market. However, it should be noted in particular that the testimony of appellant's expert was primarily centered on the availability of positions with high-level management responsibilities in the nursing field, and on appellant's level of responsibility and salary at the time of her termination. Since, as discussed above, it has not been concluded that this is the type of position to which appellant is entitled, this expert's opinion that it was unlikely appellant could have obtained substantially comparable employment in the relevant job market is not persuasive. This expert also relied on his impression of the duties and responsibilities of the position to which appellant reinstated as establishing the parameters for measuring comparability, but this does not follow. The fact that an individual may be qualified for a particular position does not render that position as the one to which positions available in the relevant job market are to be compared or as the one to which the individual is entitled to be demoted. This is determined instead by the position from which the employee was demoted. It should also be noted that, in the resume she was utilizing in her job search, appellant indicated that she preferred a position which did not have an administrative emphasis. To assert now that this is the type of position appellant was diligently seeking after her termination and the only type of position she should have been

required to accept flies in the face of appellant's own representation that this was not the kind of nursing job she was then seeking.

There is credible testimony in the record by respondent's expert that there were numerous vacant clinical nursing positions available in the Madison area during the relevant time period and that these positions were substantially comparable to Nurse Clinician positions in correctional institutions in terms of duties and responsibilities, pay (approximately $20 per hour for an experienced nurse such as appellant versus $22 per hour for a Nurse Clinician 2 with appellant's years of nursing experience), and benefits (in particular, 4-5 weeks of vacation per year for an experienced nurse.) It is concluded on this basis that the available clinical nursing positions in the Madison area during the relevant time period were substantially comparable to the Nurse Clinician 2 position to which appellant was entitled upon demotion and reinstatement.

The final question in regard to the issue of mitigation is whether there was a reasonable likelihood that appellant might have found comparable work by exercising reasonable diligence. Although appellant and her expert expressed concern about her employability in nursing positions given her termination for cause from Oakhill and her involvement in litigation challenging this termination, these employability factors are speculative only since she didn't apply for this type of work and, as a result, never tested whether these factors would actually work to her disadvantage. Moreover, the potential impact of these factors would be reduced, if not eliminated, by the serious nursing shortage in the relevant geographical area and appellant's termination from a supervisory rather than a line nursing position. Appellant contends that the fact that Mr. Rutter testified that he didn't want to hire her for the position in Mr. Ezalarab's unit demonstrates that she was not a desirable applicant for a nursing position in view of the termination and pending litigation. However, Mr. Rutter had not wanted to hire appellant because he had other plans for one of the .5 FTE positions used to construct the position for appellant. Mr. Rutter's reluctance to hire appellant had nothing to do with appellant's work history or qualifications *per se*.

It is concluded that appellant failed to exercise reasonable diligence to seek comparable employment between the date of her termination (March 13, 1997) and the date of the Commission's order (September 23, 1998).

Back pay liability is not only reduced by amounts earnable by reasonable diligence but also by an unconditional offer of reinstatement by respondent. Respondent claims here that it made such unconditional offers of reinstatement to appellant on March 26, 1998, through Mr. Ezalarab, and on March 27, 1998, through a letter to appellant from Mr. Verhagen; and that such offers terminated the accrual of appellant's back pay between the date of the offer and the date that appellant became re-employed by respondent (December 6, 1998). The resolution of this question would not disturb the conclusion reached above relating to the mitigation of damages, but was argued in the alternative by the parties.

In *Anderson v. LIRC*, 111 Wis. 2d 245, 330 N.W. 2d 594 (1983), the Wisconsin Supreme Court adopted the rule that a valid offer of reinstatement ends the accrual of back pay, and stated as follows in setting forth the requirements that an offer would have to meet to be considered "valid:"

> First, the offer of reinstatement must be for the same position or a substantially equivalent position. Comparability in salary should not be the sole test of a reasonable offer of alternative employment; it is only one factor to be considered. Comparability in status is often more important, especially as it relates to opportunities for advancement or for other employment. *Williams v. Albemarle City Board of Education,* 508 F.2d 1242, 1243 (4th Cir. 1974. [fn8] . . .
>
> Second, the offer of reinstatement must be unconditional. Any requirements attached to the offer must be the usual job requirements. . .
>
> Third, the employee must be afforded a reasonable time to respond to the offer of reinstatement. . .
>
> Finally, the offer should come directly from the employer or its agent who is authorized to hire and fire, rather than from another employee or other unauthorized individual . . .

The record shows that, in regard to both offers under consideration here, the offer was made by an individual who had the authority to offer the position, and that appellant does not dispute that she had a reasonable amount of time to respond to the offer.

In regard to the offer made by Mr. Verhagen of the Nurse Clinician 2 position at Jackson Correctional Institution, the record shows that this position was located 110 miles from appellant's home (a two-hour drive), and that appellant's former positions with respondent at Oakhill and in Madison were located an hour away from her home. The geographical location of this position was not comparable to the geographical location of the position to which appellant was entitled and it is concluded, as a result, that the offer of this position did not constitute a valid offer of reinstatement.

In regard to the Ezalarab position, the first question to be answered is whether an offer of the position was made to appellant. Mr. Ezalarab, Mr. Rutter, and Ms. Schoenike all testified that the purpose of the meeting on March 26, 1998, was for Mr. Ezalarab to offer to appellant the position which had been created for her in Mr. Ezalarab's unit. Mr. Ezalarab also testified that he did offer the position to appellant. The only contrary evidence is appellant's testimony that she didn't recall Mr. Ezalarab offering her the position during the meeting. However, the evidence shows that, within a short period of time after the close of the meeting, appellant indicated to respondent that she wasn't interested in the position. This evidences an impression on the part of appellant that the position was hers if she wanted it which is consistent with a finding that an offer of the position had been made to her. The preponderance of the credible evidence shows that Mr. Ezalarab offered the position to appellant during their meeting of March 26, 1998.

The next question is whether the offer was unconditional. Appellant testified that she understood there were strings attached to the offer but, when she was asked what these strings were, she didn't name any conditions placed on the offer but instead expressed a general concern about the impact accepting the offer would have had on her case pending before the Commission. Mr. Ezalarab testified that he placed no

conditions on the offer, and that he would not have known what conditions should be placed since he had not played a part in the settlement negotiations up to that point in time. This testimony is consistent with Mr. Ezalarab's authority, i.e., he had the authority to offer a position in his unit but he did not have the authority to engage in settlement negotiations or finalize settlement in this case. The more credible evidence here supports the conclusion that the offer made by Mr. Ezalarab was an unconditional one.

The third question is whether the offer was a reasonable one. The only component of the position which appellant apparently is asserting was not comparable to the position to which she was entitled were the travel requirements. However, the record shows that appellant inflated the travel requirements of the position based on assumptions she made which were inconsistent with information and assurances provided to her by Mr. Ezalarab. Moreover, it is reasonable to assume that this was not her actual reason for rejecting the position since she subsequently was prepared to accept a position with comparable travel requirements (See Finding of Fact 19, above), and she did accept a position with respondent without even making inquiry as to the nature of the travel requirements of the position. The evidence of record shows that the Ezalarab position was at least comparable to the Nurse Clinician 2 position to which appellant was entitled in all other aspects. It is concluded, as a result, that the offer was a reasonable one.

Appellant also asserts that the offer was not valid because it was not made in writing. However, appellant cites no authority for this proposition and this requirement was not one cited by the court in *Anderson, supra.*

The record here shows that respondent made a valid offer of reinstatement to appellant on March 26, 1998, and that, as a result, any back pay liability on respondent's part ceased as of that date.

It is concluded, pursuant to §230.43(4), Stats., that appellant failed to properly mitigate her damages, i.e., that she failed to exercise reasonable diligence to obtain comparable employment; and that any back pay liability on respondent's part ceased

upon the unconditional offer to appellant of the position in Mr. Ezalarab's unit. As a result, it is concluded that no award beyond that to which the parties have already agreed would be appropriate.

Procedural Issues

Prior to hearing, appellant filed a motion in limine requesting that evidence relating to settlement negotiations between the parties not be received at hearing. After inviting argument from the parties, the hearing examiner denied the motion, explaining that it was not possible to resolve the parties' differing characterizations of certain meetings without taking evidence relating to the conduct and content of such meetings. She noted specifically that appellant was contending that the meeting of March 26, 1998, was part of ongoing settlement negotiations, whereas respondent was contending that it was a meeting whose sole purpose was to offer appellant a job, and that it would not be possible to resolve such a dispute without receipt of evidence as to what occurred during such meeting.

During the course of the hearing, appellant attempted to introduce into evidence a letter prepared by her counsel apparently as a result of the meeting of March 26, 1998. This document had not been filed with respondent or with the Commission prior to hearing in accordance with §PC 4.02, Wis. Adm. Code. The hearing examiner excluded the document for failing to comply with the prehearing notice requirement of this rule. Appellant then attempted to offer the document as rebuttal evidence. However, the hearing examiner noted that proper rebuttal evidence under the circumstances present here would require that appellant could not reasonably have anticipated prior to hearing that what occurred during the meeting of March 26, 1998, would be at issue; and concluded that such an eventuality was anticipated by appellant as evidenced by the motion in limine. On this basis, the hearing examiner ruled that the document was not proper rebuttal. In response, appellant attempted to introduce the testimony of her counsel who had been present at the meeting of March 26, 1998.

However, the hearing examiner excluded his testimony on the same bases as those cited for the exclusion of appellant's counsel's letter noted above.

The Commission concludes that these rulings of the hearing examiner were proper.

ORDER

As agreed by the parties and consistent with the above decision, the following is ordered:

(1) Respondent is to reimburse appellant $9,082.80 for health insurance premiums.

(2) Respondent is to restore any leave time that appellant lost as the result of the termination.

(3) It is agreed that there was no break in appellant's continuous service.

(4) Respondent is to pay appellant five months of back pay at the rate to which she would have been entitled as a Nurse Clinician 2 beginning on May 14, 1997.

Dated: August 25, 1999

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM
970060Adec2

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